

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAVID L. HERING,)	No. 4:5-cv-00453-JEG
)	
Plaintiff,)	
)	
v.)	
)	
IOWA STATE PATROL,)	DEFENDANTS SMITH AND MCVEY'S
TROOPER ROBERT SMITH,)	STATEMENT OF MATERIAL FACTS
TROOPER MICHAEL MCVEY,)	IN SUPPORT OF MOTION FOR
)	SUMMARY JUDGMENT
Defendants.)	

COME NOW Defendants Robert Smith and Michael McVey, pursuant to Local Rule 56.1, and file their Statement of Material Facts in Support of Motion for Summary Judgment.

1. On August 6, 2003, Plaintiff shot his wife to death in a field near their home in Muscatine County. *State v. Hering*, 2005 WL 2756388 (Iowa App.2005), *conviction and sentence affirmed*, 2006 WL 60678 (Iowa 2006).

2. Officers who were initially dispatched to the scene had been advised that there had been a shooting and that there was a suspect at large. (App. 3, Trial Transcript: 177:12-16).

3. Officers who were later dispatched to the scene were advised that a woman had been murdered, that officers had been fired upon by the resident and were pinned down in the driveway, that they did not know where Plaintiff was and that a ten-year old boy was missing. (App. 38-39, Trial Transcript: 292:14-293:4).

4. When Officer Robert McClanahan of the Durant Police Department arrived at the scene, he pulled into the lane leading to the farmstead and five children came running to his squad car. (App. 15-17, Trial Transcript: 223:21-225:2).

5. Officer McClanahan then observed Plaintiff walking in the farmyard carrying either a shotgun or a rifle. (App. 17-19, Trial Transcript: 225:3-227:4)

6. After Sergeant Eric Furnas of the Muscatine County Sheriff's Office arrived, the officers saw Plaintiff in the hog farrowing house still carrying either a shotgun or a rifle. (App. 20-21, Trial Transcript: 228:21-229:10).

7. Officer McClanahan and Sergeant Furnas went to the rear of the squad cars and Sergeant Furnas retrieved a rifle from the trunk. (App. 21, Trial Transcript: 229:11-14).

8. At about that time, three of the children ran down the lane away from the house and two of the children remained with the officers. (App. 21, Trial Transcript: 229:15-24).

9. The three children who ran down the lane were greeted by Muscatine County Deputy Sheriff Scott Gray who directed the children into a small ditch or ravine that ran by the lane. (App. 31, Trial Transcript: 243:18-25).

10. Shortly thereafter, Plaintiff fired at officers McClanahan and Furnas. (App. 21-22, 32, Trial Transcript: 229:25-230:13; 244:1-6). The officers returned fire. (App. 22-23, 36, Trial Transcript: 230:20-231:4; 279:1-13). Plaintiff continued to fire at the officers. (App. 23, Trial Transcript: 231:8-10). The two children remained near the officers during the exchange of gunfire. (App. 23, Trial Transcript: 231:18-25).

11. At one point during the standoff, Muscatine County Sheriff Greg Orr called Plaintiff on his cell phone. After the Sheriff identified himself, the call was disconnected and

the Sheriff was unable to make further contact with Plaintiff. (App. 27-28, Trial Transcript: 237:3-238:6).

12. Shortly thereafter and as other officers arrived on the scene, Plaintiff was in the hayloft of a barn on the farmstead perched at an open window. (App. 11-13, 41, Trial Transcript: 199:17-201:2; 317:22-25). From that location, Plaintiff fired at the officers who first arrived on the scene and damaged one of the patrol cars. (App. 8-10, 32-34, Trial Transcript: 194:8-196:1; 244:14-246:17).

13. Shortly after Trooper Robert Smith arrived on the scene, Plaintiff was spotted sticking the gun out of the barn window and the officers fired a shot in that direction. (App. 58-59, Trial Transcript: 369:19-370:3). At some point later, officers again saw Plaintiff stick the gun out of the barn window and another shot was fired in that direction. (App. 65-66, Trial Transcript, 376:21-377:1).

14. Once Trooper Robert Smith was on the scene, he realized that this was the Hering house. (App. 60-62, Trial Transcript: 371:22-373:1). Because Trooper Smith's son was best friends with ten-year-old Dusty Hering, Trooper Smith called his wife to try to obtain more information about the Hering family and household. (App. 63-64, Trial Transcript: 374:19-375:9). Trooper Smith learned from his wife and son that David Hering kept firearms in the residence and that there was a gun case in the house containing several weapons. (App. 65, Trial Transcript: 376:5-17).

15. After the Iowa State Patrol Tactical Unit arrived, Sergeant McClanahan and Sergeant Furnas were able to evacuate the last two children from the lane by climbing into the squad car and backing down the lane. (App. 24-25, 66, Trial Transcript: 233:10-234:4; 377:6-10).

16. Once the last two children were evacuated from the lane, Sergeant Mark Kopf of the Muscatine County Sheriff's Office escorted the two children from the immediate area surrounding the house. (App. 4, Trial Transcript: 178:1-8). Sergeant Kopf escorted the two girls to a neighbor's residence and proceeded to interview them to develop more information concerning the incident. (App. 4, Trial Transcript: 178:9-14). During the interview process, Sergeant Kopf learned that the girls' brother, Dustin Hering, was still missing and that there were firearms located in the house. (App. 4-5, Trial Transcript: 178:23-179:9). Sergeant Kopf passed that information along to the other officers at the scene. (App. 5, Trial Transcript: 179:10-12).

17. When Trooper McVey arrived on the scene, he was advised that Plaintiff had shot his wife and was barricaded up in the barn and that there were one or more children somewhere on the farmstead, possibly in the house. (App. 49, Trial Transcript: 337:13-18).

18. Thereafter, a plan was developed by the Iowa State Patrol Tactical Team to try to locate and/or rescue the ten-year-old boy, Dustin Hering. (App. 42-43, 50, 82-83, Trial Transcript: 319:21-320:4; 338:12-21; 412:24-413:10). Two sniper/observer teams were deployed to provide perimeter security while the Iowa State Patrol Tactical Team attempted to make a stealth entry into the home to secure the residence and attempt to locate the boy. (App. 39, 67-68, Trial Transcript: 293:5-14; 382:18-383:19).

19. As part of the rescue plan, the Tactical Team decided not to let Plaintiff inside the residence under any circumstances because they did not want him to have access to food, water, more weapons and the potential to turn Dusty Hering into a hostage. (App. 70-71, Trial Transcript: 388:20-389:18).

20. After the other sniper/observer teams had moved into position, the Iowa State Patrol Tactical Team approached the residence. (App. 44, Trial Transcript: 323:15-19). As the tactical unit came around the corner of the residence, they observed Plaintiff running toward the residence. (App. 45, 51, 69-70, Trial Transcript: 325:1-4; 342:13-18; 387:14-388:5).

21. Troopers Smith and McVey simultaneously yelled "Stop, Police". (App. 52, 70, Trial Transcript: 343:4-18; 388:6-12). Plaintiff turned his head slightly toward the officers and then, increased his pace to continue to run toward the house and Trooper Smith fired two three-round bursts of shots at Plaintiff. (App. 45, 52-53, 70-72, Trial Transcript: 325:10-16; 343:19-344:2; 388:13-19; 389:19-390:19).

22. Troopers Smith and McVey followed Plaintiff to the screened-in porch of the house and attempted to place him in custody, but Plaintiff resisted arrest by fighting and screaming. (App. 45-46, 72-73, Trial Transcript: 325:18-326:25; 390:20-391:2).

23. Trooper Smith placed his rifle up against Plaintiff's back to try to force him up against the wall so that the other officers could handcuff him. (App. 74, Trial Transcript: 393:15-21). Plaintiff turned to Trooper Smith and took both hands and latched on to the rifle. (App. 75, Trial Transcript: 394: 15-19).

24. As a result of the struggle over the weapon, Trooper Smith and Plaintiff fell to the ground. (App. 76, Trial Transcript: 395:1-19).

25. Plaintiff had his hand on Trooper Smith's weapon trying to pull the trigger. (App. 46-47, 54, 76-77, Trial Transcript: 326:25-327:12; 346:4-18; 395:23-396:19). Trooper McVey struck Plaintiff several times with a flashlight, but Plaintiff continued to struggle. (App. 54-55, Trial Transcript: 346:19-347:3).

26. Trooper Rob Borelli was eventually able to grab Plaintiff's hand, get Plaintiff's finger out of the trigger, put the weapon on safe and hand the weapon to Trooper McVey. (*Id.*) Plaintiff was also maced during the struggle. (App. 47, 78-79, 84-85, Trial Transcript: 327:13-17; 398:24-399:1; 417:22-418:4).

27. Finally, the officers were able to secure Plaintiff. (App. 47, 79, Trial Transcript: 327:6-12; 399:2-4).

28. The struggle was very chaotic. (App. 55, Trial Transcript: 347:18-25). There were six people in the screened-in porch during the struggle. (App. 55, Trial Transcript: 347:21-348:3). Plaintiff was very combative. (App. 78, Trial Transcript: 398:22-23). Once Plaintiff was subdued, the officers noticed that Plaintiff's leg was bleeding and he was provided medical treatment. (App. 47, 56, Trial Transcript: 327:18-20; 348:18-22).

29. Once Plaintiff was in custody, Trooper Smith went into the residence with Trooper Borelli and located ten-year-old Dusty Hering, who was then transported to the Durant Fire Department where his relatives were waiting. (App. 79-80, Trial Transcript: 399:5-400:4).

30. Following Plaintiff's arrest, the home was searched and additional firearms were discovered on the property, including a double barrel, 10-gauge shotgun leaning against the wall in the kitchen. (App. 6-7, Trial Transcript: 191:17-192:4).

WHEREFORE, Defendants Robert Smith and Michael McVey request that the Court grant their motion for summary judgment and dismiss this action in its entirety.

Respectfully submitted,

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Proof of Service

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on December 18, 2006.

<u> </u> U.S. Mail	<u> 9 </u> FAX
<u> 9 </u> Hand Delivery	<u> 9 </u> Overnight Courier
<u> 9 </u> Federal Express	<u> 9 </u> Electronic Filing

Signature: /s/ Val Naset